United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-5029

In The

United States Court of Appeals

For The Second Circuit

In re

INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al.,

Debtors-Appellees,

DOMINICK'S FINER FOODS, INC.,

Appellant.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR APPELLEES

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ISSUES PRESENTED

1. Should the within appeal be dismissed as moot as a result of the consummated sale to Doyle, a good faith purchaser, pursuant to the unstayed orders of the District Court dated July 19, 1976, and the Bankruptcy Court dated September 14, 1976?

2. If the within appeal is not dismissed as moot, should the memorandum and order of the District Court dated July 19, 1976 be affirmed on the merits?

STATEMENT OF THE CASE

Appellee reorganization Trustees ("Trustees") submit this brief in opposition to the appeal of Dominick's Finer Foods, Inc. ("Dominick's") from the memorandum and order of the District Court dated July 19, 1976 (7a). By that decision, the District Court vacated the order of the Bankruptcy Court dated May 24, 1976 (91a) confirming the sale of certain property of one of the debtors in the proceeding located in Chicago Heights, Illinois. The sale had occurred at a hearing before Bankruptcy Judge Ryan on May 17, 1976, at which time the Court accepted the bid of $685,000 submitted by appellant Dominick's.

STATEMENT OF FACTS

On May 22, 1974, Interstate Stores, Inc., and its 188 subsidiaries, filed petitions under Chapter XI, Section 322 of the Bankruptcy Act with the United States District Court for the Southern District of New York. Thereafter, an amended petition for reorganization of all the debtors pursuant to the provisions of Chapter X of the Bankruptcy Act was filed on June 13, 1974, and on the same date, the amended petition was approved by order of the Court. Pursuant to

that order, Joseph R. Crowley and Herbert B. Siegel were appointed, have qualified and are now acting as Reorganization Trustees of the debtors, including Illinois Topps Realty Corp., one of the subsidiaries of Interstate Stores, Inc.

Illinois Topps Realty Corp. was the owner of 6.71 acres of land, improvements thereon and property used in connection therewith located at 160 West Joe Orr Road, Chicago Heights, Illinois (the "Property"). In March 1976, Appellee John E. Hancock ("Hancock") began negotiating for the purchase of the Property with Jeffrey Finkel, who was in charge of the real estate of Interstate Stores. Mr. Finkel and Hancock negotiated a private sale, subject to Court approval, pursuant to which Hancock would acquire the Property for the price of $650,000.

While this agreement was being negotiated, Hancock's Chicago counsel and Shea Gould Climenko & Casey, counsel for the reorganization Trustees, began discussions concerning the format of the written agreement to be undertaken between the Trustees and Hancock. An agreement between them was entered into on April 20, 1976 (the

"Contract"). (23a.) Pursuant to the Contract, the Property would be sold to Hancock , subject to the approval of the Court. The purchase price for the Property, which was in line with its appraisal value, was $650,000, payable $45,000 on the execution of the Contract ($10,000 to the Trustees and $35,000 to an escrow trust established with Chicago Title & Trust Company, Chicago, Illinois), $401,641.57 at closing in cash and $203,358.43 by taking subject to the existing first mortgage, provided that the cash payable at closing was to be increased by the aggregate amount of reductions in the principal amount of that first mortgage.

By application dated April 29, 1976, the Trustees sought an order from the Bankruptcy Court approving the agreement with Hancock. In their application, the Trustees suggested that notice of the application in the form annexed as Exhibit B to the application be sent to the persons listed on Exhibit C thereto. (67a,69a.)

The following day, April 30, 1976, Bankruptcy Judge Ryan signed an order requiring that the individuals listed on Exhibit C to the Trustees' application, upon whom it was ordered that notice be served, show cause on May 17, 1976 why the Trustees' application should not be granted.

Neither the application of the Trustees nor the accompanying proposed order which Judge Ryan signed articulated the basis for the limited notice period or the reason for limiting the class of individuals to whom notice would be sent.

A "Notice of Hearing on Application", dated May 3, 1976, was sent by the Trustees to the persons on the list approved by the Bankruptcy Court. (72a.) The Notice provided that the 17th day of May, 1976 had been fixed as the time and place for a hearing

> "for the consideration of an application for an order (i) approving an agreement between John E. Hancock ("Hancock") and the Trustees as Trustees of Illinois Topps Realty Corp. ("Realty") to sell to Hancock the property and improvements at 160 West Joe Orr Road, Chicago Heights, Illinois for the price of $650,000 (ii) transferring all liens and security interests against any of the property (except permitted encumbrances) to the proceeds of the sale and (iii) authorizing the rejection of the store lease dated May 1, 1961, as amended, by the Trustees as Trustees of Realty."

(72a.)

On or before May 12, an associate of Shea Gould Climenko & Casey, Mr. Rotkin, spoke with John Kaveny, attorney for Mr. Hancock, and indicated that another party had expressed an interest in purchasing the Property. (Affidavit of

Gilbert E. Rotkin, 224a.) However, Mr. Rotkin did not state that "public bidding" would occur at the May 17 sale. (Tr. of June 28, 1976 before Bankruptcy Judge Ryan, 459a.) In response, Mr. Kaveny stated, in effect, that if the other party bid so much as one dollar more, Hancock would withdraw. (Affidavit of Gilbert E. Rotkin 224a.) Mr. Rotkin answered that "the contract was binding on Hancock as well as on the Trustees, subject to court approval." Id. However, on May 14, and immediately before the hearing on May 17, Mr. Kaveny repeated to counsel for the Trustees that his client would withdraw if there was a "one dollar higher offer."

At the May 17 hearing, Mr. Yassky, a member of the firm of Shea Gould Climenko & Casey, stated to the Bankruptcy Court:

> "The last matter we have on this morning, your Honor, is an application to approve the sale of certain vacant premises owned by one of the debtors in this proceeding in Chicago Heights, Illinois. Again, the facts supporting this application are set forth therein. We have received an offer. The trustees have entered into a written contract for the sale of this property at a price of $650,000.
>
> * * *

> " . . . there is a binding contract on this between the Trustees and the buyer, subject, of course, to this Court's approval."

(79-80a.)

Despite Hancock's protests, during the May 17 hearing competitive bidding was permitted. Dominick's submitted a bid of $675,000, which Hancock matched. However, when Dominick's increased its bid another $10,000, Hancock stated, "[t]his is fun and games," (88a), and withdrew from the bidding.

Shortly after the hearing had concluded, but on the same day and, in any event, prior to confirmation of the sale, Hancock advised the Court that he was prepared to bid $725,000 for the Property, $40,000 more than the "successful" bid by Appellant. Although the Bankruptcy Judge had emphasized at the May 17 hearing that the Court "[was] under an obligation to accept the highest price at least before the sale is confirmed," (87a), Hancock's offer was rejected and, on May 24, the sale to Dominick's was confirmed.

On June 3, 1976, both Hancock and AMF Incorporated, a creditor, appealed to the District Court from the order of confirmation. Thereafter, Hancock submitted to the Bankruptcy Court a proposed Order to Show Cause why the sale should not be vacated and set aside. The application also sought a temporary restraining order preventing the

parties from closing the sale until the motion to set it aside was determined. Although Judge Ryan scheduled a hearing on the motion for June 28, 1976, he denied the application for a stay and, on June 21, Hancock appealed that partial denial to the District Court.

At the June 28 hearing, Mr. Feller of the Securities and Exchange Commission pointed out to the Bankruptcy Court that:

> "a judicial sale is not finalized until an order is entered, and whatever the reason may have been -- I don't know; I can't probe into Mr. Hancock's mind. I don't think your Honor could. He did advise the Court prior then to the entry of an order that he was ready, willing and, I would assume, able to increase his bid. I do not know why an order was not entered. I do think that the estate, the creditors and the stockholders over here should not be deprived of the additional consideration that could be had in the sale of this property. As has been indicated, this bid is a minimum upset price. It may even be increased.
>
> Under these circumstances, I do not believe that anyone would be prejudiced, other than the estate itself, were this matter not reopened for future bidding . . ."

(486-87a.)

Notwithstanding these remarks, the Bankruptcy Court denied the motion to vacate the sale to Dominick's as well as Hancock's subsequent request for a stay. The parties

then proceeded immediately to Judge Cannella who, on the oral application of Hancock, AMF and the SEC, granted a stay preventing the Trustees and Dominick's from closing the sale.

In granting the stay, Judge Cannella expressed his concern that Hancock had been prejudiced as a result of the competitive bidding that took place at the May 17 hearing:

> "You might argue that [Hancock] was so sure it would have been a rubber stamp proposition [i.e., that the Bankruptcy Court was going to rubber stamp his contract with the trustees on May 17] that he was not aware to do anything else and for that reason, being non-plussed, as it was, he simply walked out without protecting his rights. If he had any idea at all that there was further bidding on it [the sale of the Property], if he had any sense at all and would have thought about it, he would have come in with another price and he was not prepared to do that at all. He simply turned around and walked out, apparently."

(509a.)

Mr. Feller of the SEC also pointedly addressed the merits of the proceedings in the Bankruptcy Court:

> "... in view of the fact that the very, very same date of [the May 17] hearing, after the hearing, apparently when the dust settled, Hancock had advised the Court and the Trustees that he was prepared to bid in some $40,000 more as a minimum upset price.
>
> "The entry of the order confirming the sale subsequent to that advice does raise questions with regard to the equities of the overall estate over here. It's difficult to understand."

(514a.)

In a decision dated July 19, 1976 (7a), the District Court vacated the order of confirmation and remanded the matter to the Bankruptcy Judge "for further proceedings in conformity with [the] opinion." (17a.) Judge Cannella determined that the Notice distributed by the Trustees was inadequate and therefore prejudicial to prospective purchasers and the ability of the estate to realize the highest possible price for the sale of the Property. As an independent basis for its decision, the Court also determined that the "notice procedure" employed in connection with the May 17 sale violated the requirements of Bankruptcy Rule 10-209(b)(4). Moreover, as demonstrated infra, implicit in the opinion was the District Court's concern over Judge Ryan's refusal to consider Hancock's telegraphed bid of $725,000, notwithstanding the fact that it exceeded Dominick's "successful" bid by $40,000.

On August 11, 1976 Dominick's filed a Notice of Appeal from the District Court's decision, and, two days thereafter, it sought by ex parte application to the District Court a stay pending its appeal pursuant to Rule 8 of the Federal Rules of Appellate Procedure. In its application, Dominick's expressly conceded that if a stay was not granted, its appeal to this Court would become moot as a result of the then contemplated sale to Hancock.* Nevertheless, after the District Court orally denied

* Silverman Affidavit in Support of a Stay Pending Appeal at ¶5 (Ex. 1 to Kruger Reply Affidavit in Support of Appellees' Motion to Dismiss This Appeal).

the stay on August 13 and confirmed the denial in writing three days later, Appellant declined to seek a stay from this Court pursuant to Fed. R. App. P. 8.

As no stay had been obtained, pursuant to Judge Cannella's decision a hearing for the sale of the Property was held before the Bankruptcy Court on September 10, 1976. In accordance with the Court's decision, the Notice for the hearing indicated that its purpose was to sell the Property to Hancock for $725,000 or to any other person who would make a higher or better offer. It expressly invited competitive bids. (A copy of the Notice is annexed as Exhibit B to the motion of Appellee Hancock to dismiss the instant appeal as moot.) (583a.)

At the September 10, 1976 hearing Dominick's and Patrick J. Doyle, Hancock's Assignee, engaged in vigorous bidding. The highest bid, $1,210,000, was submitted by Doyle and it was accepted by the Bankruptcy Court. Dominick's final bid was $1,200,000, almost twice the amount which it would pay for the Property if it succeeds on this appeal. On September 14, 1976, Bankruptcy Judge Ryan confirmed the sale ( ), and ten days thereafter Appellant filed a Notice of Appeal to the District Court from the order of confirmation. However, Appellant subsequently abandoned its appeal by failing to comply with Bankruptcy Rule 806 (made applicable to Chapter X proceedings by Bankruptcy

Rule 10-801). Moreover, Appellant once again declined to preserve the status quo by seeking a stay of the order of confirmation from any Court.

In the absence of a stay, pursuant to the order of confirmation the sale to Doyle was closed in escrow on September 16, 1976. Shortly thereafter, the money was released from escrow and a deed was delivered. In short, the sale was consummated. As a result, the within appeal has been rendered moot and should be dismissed. See Point I, infra.

POINT I

THE WITHIN APPEAL HAS BEEN RENDERED MOOT AS A RESULT OF THE CONSUMMATED SALE TO DOYLE PURSUANT TO THE UNSTAYED ORDERS OF THE DISTRICT COURT DATED JULY 19, 1976 AND THE BANKRUPTCY COURT DATED SPETEMBER 14, 1976.

By its July 19, 1976 order the District Court vacated Bankruptcy Judge Ryan's confirmation of the sale to Dominick's and remanded the matter back to the Bankruptcy Court for proceedings in conformity with the opinion. The remand clearly contemplated a new hearing with further bidding, a fact expressly conceded by Appellant. Memorandum of Appellant in Opposition to Motion to Dismiss the Appeal at 5. Consistent with that remand, on August 13, 1976 Judge Ryan signed an order to show cause (581a) upon the Trustees' application for a hearing to be held on September 10, 1976 to sell the property to Hancock or " ... to any person, firm or corporation who or which may make a higher or better offer therefor than the Hancock Offer...." (584a). On the same date, August 13, twenty-five days after the District Court's decision, Appellant unsuccessfully sought ex parte from the District Court an order requiring Appellees to show cause

why a stay of the District Court's decision pending appeal should not be issued. Judge Cannella orally denied the requested stay and, three days thereafter, on August 16, he confirmed his denial by a brief written statement. (18a). Although Appellant had expressly premised its application to the District Court upon Fed. R. App. P.8, it failed to avail itself of the clear procedure provided by that Rule by seeking a stay from this Court.

Since no stay of the District Court's order had been obtained, "the prevailing part[ies were entitled to] treat the judgment of the district court as final, notwithstanding that an appeal [was] pending." 9 J. Moore, Federal Practice, ¶208.03 at 1407 (2d ed. 1975); 14 Collier on Bankruptcy, ¶11-62.03 at 11-62-9 (14th ed. 1976). Consistent with the District Court's decision, on September 10 a second sale of the Chicago Height's property was held before the Bankruptcy Court. After vigorous bidding between Dominick's and Patrick J. Doyle, Hancock's Assignee, Judge Ryan accepted Doyle's bid of $1,210,000, over one-half million dollars more than the amount successfully bid by Dominick's at the first sale. Dominick's final bid at the second sale was $1,200,000, almost twice the amount for which it would take the property if it succeeds on this appeal.

By order dated September 14, 1976, the Bankruptcy Court confirmed the sale to Doyle (a). Although Appellant appealed that order to the District Court ten days thereafter, it never attempted to protect its rights on that appeal or the instant one to this Court by seeking a stay of the Order pursuant to Bankruptcy Rule 805, incorporated in Chapter X proceedings by Rule 10-801. Subsequently, Appellant failed to perfect its appeal to the District Court by failing to comply with Bankruptcy Rule 806.*

In accordance with the order of confirmation, the sale to Doyle was closed in escrow on September 16, and shortly thereafter the money in escrow was released. In short, the sale was consummated. Under these circumstances, the within appeal is moot. E.g., Rules of Bankruptcy Procedure 10-801; Country Fairways, Inc. v. Mottaz, et al., CCH Bankruptcy Law Reporter ¶66,023 (7th Cir. 1976); In the Matter of Abingdon Realty Corp., 530 F.2d 588 (4th Cir. 1976); Sterling v. Blackwelder, 405 F.2d 884 (4th Cir. 1969); Fink v. Continental Foundry & Machine Co., 240 F.2d 369 (7th Cir.), cert. denied, 354 U.S. 938 (1957); 14 Collier on Bankruptcy, ¶11-62.03 at 11-62-12 (14th ed. 1976); 9J. Moore, Federal Practice, ¶208.03 at 1407-08 (2d ed. 1975).

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* Rule 806, like Rule 805, is made applicable to Chapter X proceedings by Rule 10-801. It requires that "[w]ithin 10 days after filing the notice of appeal the appellant shall file with the Referee and serve on the Appellee a designation of the contents for inclusion in the record on appeal and a statement of the issues he intends to present on the appeal."

Bankruptcy Rule 10-801 incorporates Part VIII of the Bankruptcy Rules but adds the following to Rule 805 thereof (entitled "Stay Pending Appeal"):

> "Unless an order approving a sale of property or issuance of a certificate indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal."

Rule of Bankruptcy Procedure 10-801 (2). As Professor Moore has recognized, "a stay pending appeal...is necessary... if what may be done under the judgment [appealed from] is beyond the power of the court of appeals to undue by its judgment." 9 J. Moore, Federal Practice, ¶208.03 at 1408(2d ed. 1975). In the present case, no stay of the September 10 sale was obtained and it has been consummated. Under Bankruptcy 10-801(2) that consummated sale cannot be undone and, as a result, the instant appeal is moot.

A dismissal of this appeal as moot need not, however, be predicated on the Bankruptcy Rules. A finding of mootness is also required by the long-established legal principles codified in Rule 10-801(2).

As recognized by the Advisory Committee Notes to that Rule, the Rule "is declaratory of existing case law." Advisory Committee's Note-1976 Amendment to Bankruptcy

Rule 805 (the amendment added to Rule 805 the sentence theretofore supplied in Chapter X proceedings by Rule 10-801(2)). The principle established by that case law may be simply stated: a sale pending appeal of an unstayed order permitting the sale to proceed will moot the appeal. E.g., In the Matter Abingdon Realty Corp. 530 F.2d 588 (4th Cir. 1976); Sterling v. Blackwelder, 405 F.2d 884 (4th Cir. 1969). Professor Moore has confirmed this principle:

> "[T]here appears to be a particular danger of dismissal for mootness and thus a special need for seeking a stay when the district court judgment refuses to enjoin an impending sale of property."

9 J. Moore Federal Practice, ¶208.03 at 1408 (2d ed. 1975).

In the Matter of Abingdon Realty Corp., 530 F.2d 588 (4th Cir. 1976), a "straight bankruptcy case" decided before Rule 805 was amended to include the provision quoted above, is a highly instructive case. After an unsuccessful attempt to reorganize, "Abingdon," whose principal asset was an office building",was adjudicated bankrupt. After bidding and lengthy hearings, on November 29, 1974 the Bankruptcy Judge approved and ordered a sale of the building to Savage/Fogarty Companies, Inc., the highest bidder. It was later ordered, on December 11, 1974, that the sale be closed in escrow and, thereafter, it was ordered that the money in escrow be released and a deed

delivered to the purchaser. Both Abingdon's Trustee in Bankruptcy and a creditor appealed to the District Court from the November 29 and December 11 orders. However, pending appeal the Trustee dropped its appeal and the creditor was adjudicated bankrupt. The purchaser, Savage/Fogarty, then moved to dismiss the creditor's appeal for lack of standing and on grounds of mootness. While that motion was pending, the Receiver for the bankrupt creditor successfully sought leave to abandon its appeal as a burdensome asset. Nevertheless, counsel for the creditor (as opposed to its Receiver) appeared before the District Court to argue against the purchaser's motion to dismiss the appeal. Counsel claimed that when the Receiver abandoned the appeal, "standing" was given to the creditor itself. The District Court, however, dismissed the appeal.

"By Counsel" the creditor appealed the District Court's order of dismissal to the Fourth Circuit. The purchaser, Abingdon's Trustee in Bankruptcy and Metropolitan Life Insurance Company (which had one of two deeds of trust to which Abingdon's office building had been subject) filed briefs in opposition. They argued, in part:

> "That the order of the bankruptcy judge approving the sale of the building to Savage/Fogarty, a good faith purchaser, was not stayed pending appeal, that the sale had been consummated, and that [the creditor's] appeal was therefore moot.

530 F.2d at 589. The Court of Appeals agreed, holding that the "appeal from the orders of the bankruptcy judge had become moot." Id.* (emphasis supplied).

Although the Abingdon Court emphasized that its decision was consistent with the then proposed amendment to Bankruptcy Rule 805, its ruling predated the adoption of the amendment and was clearly predicated on the established principles and the substantial case law of which the amendment is declaratory. In relevant part, the Court's opinion reads as follows:

> "It is settled law that the filing of a petition to review an order of a bankruptcy judge (formerly a referee in bankruptcy), does not stay the effect or operation of the order unless a supersedeas bond is filed or the order itself provides for a stay. Sterling v. Blackwelder, 405 F. 2d 884 (4 Cir. 1969); Taylor v. Austrian, 154 F. 2d 107 (4 Cir. 1946); In re Spier Aircraft Corp., 137 F.2d 736 (3 Cir. 1943); Quinn v. Gardner, 32 F. 2d 772, 773 (8 Cir. 1929); In re Stratford Financial Corp., 264 F. Supp. 917, 918 (S.D.N.Y. 1967); 2A Collier on Bankruptcy, 14th ed., 1974 para. 39.26 p. 1526. A proposed amendment to Bankruptcy Rule 805, which has been approved by the Judicial Conference of the United States, would add the following sentence at the end of that rule: 'Unless an order approving a sale

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* In so holding the Court noted that "[i]n view of our decision on this point, it is unnecessary to consider the other points raised by the respective parties." Id. Accordingly, any assertion, such as that in Dominick's Memorandum in Opposition to the Motion to Dismiss this Appeal, that the Circuit Court's decision in Abingdon was based on some ground other than mootness, such as lack of standing, is clearly frivolous.

> of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance [5] of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal.' The Advisory Committee's Note states that the sentence proposed to be added 'is declaratory of existing case law'. We agree. Sterling v. Blackwelder, supra; Taylor v. Austrian, supra. See also Fink v. Continental Foundry & Machine Co., 240 F.2d 369 (7 Cir.) cert. den. 354 U.S. 938 (1957); Sobel v. Whittier Corp., 195 F.2d 361 (6 Cir. 1952); 11 Wright & Miller, Federal Practice and Procedure: Civil Sec. 2904, n. 31.
>
> Savage/Fogarty was a good faith purchaser and assumed a substantial obligation to Metropolitan Life whose mortgage was in default. No stay of the effectiveness of the orders of the bankruptcy judge was sought by [the creditor], its receiver in bankruptcy, or anyone else, and the sale had been consummated. The appeal from the orders of the bankruptcy judge had become moot since under these circumstances the district judge could not properly have ordered that the sale be set aside."

530 F.2d at 589-90.

In short, the Abingdon decision and the cases it cites confirm that even apart from the operation of Bankruptcy Rule 10-801 (and Rule 805) the instant appeal must be dismissed as moot.

The principle that a consummated sale pending appeal from an unstayed order permitting the sale to proceed will moot the appeal has particular merit in the context of judicial sales authorized by the Bankruptcy Court. This conclusion is amply supported by Colliers' commentary to former Bankruptcy Rule 11-62(2).

That Rule was the exact counterpart to Rule 10-801(2)* and Collier's commentary regarding it is relevant to the question before this Court. It warrants extensive quotation:

> "A party aggrieved from an order or a judgment of the bankruptcy court from which an appeal may be taken is not obliged to procure a stay pending determination of the appeal. The only consequence of failure to procure a stay is that the party against whom the appeal is taken may treat the judgment or the order of the bankruptcy court as final notwithstanding the mere filing of a notice of appeal. But, as a practical matter, situations must arise in which what the order seeks to achieve for the benefit of the prevailing party will be beyond the power of reversal or undoing regardless of whether or not the order or judgment ultimately stands or is set aside. In such cases, procurement of a stay is virtually mandatory. Otherwise, quite apart from whether or not the appeal might be dismissed as having become moot, success on the appeal will mean nothing to the appellant even if reversal is had. Thus, it had generally been held, not only under Section 39c of the Act, but under the Federal Rules of Appellate Procedure as well, that the mere filing of notice of appeal would not, in and of itself, operate as a stay of the effect of the order or judgment from which the appeal is taken. The judgment would remain effective and its effect would in no way be stayed. The same principle

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* Effective August 1, 1976, subdivision (2) of the Rule was deleted because the provision it contained was made a part of Rule 805 which is applicable to Chapter XI (as well as Chapter X) proceedings.

applies to an appeal from an order of the bankruptcy court under the scheme now set out in Part VIII of the Bankruptcy Rules. . . .

* * * * *

. . . The expression of purpose by Rule 11-62(2) was in keeping with the impulse behind Rule 803 that there be finality and repose to unappealed orders and judgments of the bankruptcy court.

Just as Rule 11-62(1) amplifies Rule 302(c) to preclude untimely appeals from orders or judgments authorizing the sale of property or the issuance of certificates of indebtedness, so the former addition to Rule 805 gave the effect of such order or judgment finality and repose unless the effect of such order or judgment is affirmatively stayed pending appeal.

The provisions of Rule 805 describe the methods by which such stay may be procured, and it, therefore, seems that if a party aggrieved by an order wishes to protect himself, Rule 805 gives ample opportunity to protect the rights of all parties. However, unless a party aggrieved by the sale of property . . . follows the route prescribed by Rule 805, he will not be heard to affect a good faith purchaser of property . . . pursuant to the order of the court whether or not the order . . . is ultimately reversed, modified, or remanded. This is in furtherance of the policy of not only affording finality to the judgment of the bankruptcy court, but particularly to give finality to those orders and judgments upon which innocent third parties rely. A purchaser in good faith of property pursuant to an order of the bankruptcy court . . . should have the right to rely on the effectiveness of that order and to acquire rights thereby based upon the furnishing of good and valuable consideration . . .

> It is, therefore, only proper that if some party who has not furnished any consideration or been hurt out of pocket wishes to challenge the order conferring the rights on the purchaser in good faith or the holder in good faith, he do so not only by timely appeal as provided for by Rule 802(c) and Rule 11-62(1), but that in addition, he effectively secure a stay of the effective portions of the order or judgment pursuant to which innocent parties may part with consideration and rely upon what they have received from the debtor in return. . . .
>
> Apart from finality, this addition to Rule 805 by Rule 11-62(2) gave continued integrity to the judicial sale process upon which reliance is had and upon which consideration was given. . . . In short, Rule 11-62(2) represented a policy determination in respect of good faith purchasers of property in reliance upon an order of the court. . . ."

14 Collier on Bankruptcy, ¶11-62.03 at 11-62-8-12 (14th ed. 1976) (emphasis supplied).

In sum, Appellant failed to obtain a stay of either the District Court's decision of July 19 or the Bankruptcy Judge's order of September 14 confirming the sale to Doyle. Nor has Appellant even perfected an appeal from that order of confirmation. The September 10 sale to Doyle, a good faith purchaser, has been consummated. Under these circumstances, pursuant to Rule 10-801(2) and the established principles which it and Rule 805 reflect, the appeal before this Court is moot.

Against this conclusion, Appellant has really offered only two arguments.

Appellant's primary contention is that neither the principles nor Rules discussed above apply where the purchaser of the property is "before the court." This contention is devoid of merit. First, the most likely party to an appeal concerning the judicial sale of property is the purchaser. Thus, if the purported "exception" that Appellant suggests truly existed, it would "swallow" the Rule. Second, neither Colliers (14 Collier on Bankruptcy, ¶11-62.03 (14th ed. 1976)), Professor Moore (9 J. Moore, Federal Practice, ¶208.03 (2d ed. 1975), nor relevant cases such as In the Matter of Abingdon Realty Corp., 530 F.2d 588 (4th Cir. 1976) even mention such an exception, despite extensive commentary on the subject. In fact, that commentary, as demonstrated above, squarely supports a finding that the present appeal is moot. Similarly, neither Bankruptcy Rules 10-801(2) and 805, the Advisory Committee's Notes thereto, cases decided thereunder (such as Country Fairways, Inc. v. Mottaz et al., supra), nor the substantial commentary on the Rules (14 Collier on Bankruptcy, ¶11-62.03 (14th ed. 1976)) even remotely suggest that the Rules are limited to "strangers". Surely, if such a severe limitation existed, one of these sources would have addressed it.

Finally, in both In the Matter of Abingdon Realty Corp., supra, decided under prior case law, and in Country Fairways, supra, decided under the Bankruptcy Rules (which by then had codified the case law rule) the purchasers were before the court. In the former case it was the purchaser, Savage/Fogarty, who moved to dismiss the appeal before the District Court on grounds of mootness. 530 F.2d at 589. Later, in the Court of Appeals, the purchaser filed a brief in opposition to the appeal, arguing again that it was moot. Id.

In Country Fairways, supra, the appeal concerned, in part, the District Court's dismissal of the Debtor's appeal from the Bankruptcy Court's order confirming a sale of its assets. The purchaser of those assets, Michael Kane, was an "intervenor" before the court.

There is, therefore, no basis for the contention that either the Bankruptcy Rules or the established case law which they reflect would moot this appeal only if the purchaser was not before this Court.*

Appellant's remaining argument against a ruling that its appeal is moot is equally without merit. Appellant contends that the District Court modified or "conditioned" its decision of July 19 by its brief statement of August 16 which confirmed

*Dominick's also argues that the July 19 decision is not encompassed by Rule 805 because it is not technically an order approving a sale. Such an overtechnical argument defeats the entire purpose behind the Rule. Those who relied on the unstayed order of Judge Cannella remanding the matter below for a resale are clearly entitled to the protection embodied in the Rule. Moreover, Appellant's argument ignores the fact that the sale mooting its appeal was consummated pursuant to the unstayed order of confirmation

the earlier oral denial of Appellant's ex parte application for a stay pending appeal. (18a.) According to Appellant, when the Court "spoke" on August 16 it took the very serious legal step of modifying the July 19 decision by ordering that only a "defeasible" title subject to the instant appeal could be conveyed at the resale contemplated by that decision. Appellant infers this from the following two-sentence statement by the District Court:

> "If the Court of Appeals determines that this Court's order should be reversed, it may direct that the sale as confirmed by Judge Ryan on May 24, 1976 be reinstated. The Court therefore does not believe that Dominick's will be prejudiced by the lack of a stay, or that the consummation of the sale will moot the appeal."

(18a) (emphasis supplied).

Appellant's argument is patently unsound. Even if the District Court had intended to modify its earlier decision, which it manifestly did not, it lacked the authority to do so. The law is clear that when Appellant appealed the July 19 decision to this Court, the District Court was divested of jurisdiction to alter or amend that decision. E.g., Hattersley v. Bollt, 512 F.2d 209, 215 n.17 (3d Cir. 1975); Taylor v. Wood, 458 F.2d 15, 16 (9th Cir. 1972); Edmond v. Moore-McCormack Lines, 253 F.2d 143, 144 (2d Cir.), cert. denied, 358 U.S. 848 (1958).

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of September 14. That order clearly is within Rule 805 and reliance on it in the absence of the stay is protected by the Rule. In any case, as demonstrated, the case law reflected by the Rule moots the appeal and makes meaningless the artificial and erroneous construction Appellant gives the Rule.

Moreover, there is no support for the belief that the District Court intended to modify its decision of July 19. If, by the dicta in its one-paragraph statement, the District Court had truly intended that, it would hardly have said on August 16 that the Court of Appeals "may" reinstate the first sale upon a reversal or that the District Court did not "believe" that Dominick's would be prejudiced by the lack of a stay. Rather, words like "may" and "believe" were used because the District Court was merely expressing its opinion or belief as to the effect of an intervening sale on the pending appeal. In no sense was the Court actually modifying its earlier decision.

Evidently the District Court concluded that a stay was unnecessary because of the erroneous belief that a consummated sale would not moot the appeal. That the Court held an incorrect belief may be understood by the fact that it did not have the benefit of thorough research by the parties; nowhere in Appellant's ex parte application for a stay were the relatively new Bankruptcy Rules 10-801(2) and 805 even mentioned.* In any case, the Court's indication of its "belief"

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* Appellant has indicated that it did not proceed before this Court for a stay because it was satisfied with Judge Cannella's decision. Affidavit of A. Silverman in Opposition to the Motion to Dismiss at ¶ 10. Since Appellant did not cite Rules 10-801(2) and 805 in its application to the District Court, presumably it was not aware of their existence. Thus, Appellant may well have believed that Judge Cannella was correct. Nevertheless, faced with a denial of the stay it had requested, Appellant's choice was to approach this Court or take its chances on the correctness of the decision below.

was hardly a modification of its comprehensive July 19 opinion.

Appellant argues, however, that all the parties shared the belief that when Judge Cannella denied the stay he expressly conditioned and modified his July 19 decision. Appellant claims that this is revealed by the transcript of the September 10 hearing at which the second sale occurred.* In fact, the transcript reveals just the opposite.

At page 9 of the transcript (a) the following colloquy between Judge Ryan and Mr. Yassky, counsel for the Trustees, took place:

> THE COURT: Let me ask you this: is it clear to the trustee that the Trustee is of the opinion that if the Court of Appeals shall reverse Judge Cannella, the offer today shall then become moot and academic?
>
> MR. YASSKY: If we have closed before there is a decision --
>
> THE COURT: What's your closing date?
>
> ....

(a). It is most reasonable to believe from the way Mr. Yassky began his response that, had he not been interrupted, he would have indicated his belief that if the sale to Doyle was consummated before the Court of Appeals reached a decision, the appeal would be rendered moot.

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* The transcript of the September 10 hearing appears as Ex.C to the affidavit of Arthur Silverman in opposition to Hancock's motion to dismiss the instant appeal.

Nor does the transcript suggest that Hancock's attorney shared the belief that Judge Cannella had modified his July 19 decision by his August 16 statement. He specifically stated that "[he did] not read Judge Cannella's decision [of August 16] that way [i.e., that a reversal by this Court would make the sale of September 10 a nullity]." (a)(Tr. at 10.)

Nor, finally, does the following exchange provide support for Appellant's argument. (Tr. at 39.)

> MR YASSKY: It is also understood that you will not assert as a cloud on the title, and you accept the title to be marketable, notwithstanding the present status of the appeal by Dominick's of the order of Judge Cannella?
>
> MR. BERNFIELD[Attorney for Doyle]: Yes.

(a) By his question Mr. Yassky wanted to assure himself that Doyle understood that the title was marketable despite the pending appeal. Mr. Yassky's concern was that the emphatic assertions by Dominick's attorney regarding the alleged effect of the pending appeal had possibly confused Mr. Doyle, who was not a lawyer. The question put to Doyle was simply designed to eliminate any confusion that might inhibit a smooth closing. When Doyle answered "yes", he indicated that he shared the understanding that the marketability of the title was not affected by the pending appeal.

In sum, under the applicable Bankruptcy Rules and relevant case law, the appeal from Judge Cannella's decision has been rendered moot by the consummated sale to Doyle. Nothing in those Rules nor that case law saves the appeal from mootness because of Doyle's alleged presence before this Court. Nor is the appeal saved by any "modification" or "conditioning" by the District Court of its July 19 decision.

Appellant failed to take advantage of the several opportunities it had to preserve the status quo and avoid mootness. Its appeal must now be dismissed.

POINT II

IF THE INSTANT APPEAL IS NOT DISMISSED AS MOOT, THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED ON THE MERITS.

This Court is being asked to reverse a carefully considered decision by the District Court refusing to uphold Bankruptcy Judge Ryan's confirmation of the sale of certain property.

In In re General Insecticide Co., 403 F.2d 629 (2d Cir. 1968) this Court emphasized the governing concern in evaluating the propriety of an order confirming a bankruptcy sale:

> "The standard for setting aside a sale is stricter than that applied in a direct attack on a confirmation. In the latter, the governing principle is to obtain the best price for the bankruptcy estate whereas in the former there is greater emphasis upon finality in judicial sales . . . ."

403 F.2d at 630-31.

Pursuant to a notice of sale approved in accordance with the terms of Judge Cannella's decision, the property which is the subject of this appeal was sold on September 10, 1976. Vigorous bidding between Dominick's and Hancock's assignee, Doyle, resulted in a successful bid by Doyle of $1,210,000 --

approximately twice the amount realized at the first sale. The effect of this is twofold. First, it confirms the propriety of Judge Cannella's decision. The gross disparity between the proceeds of the two sales certainly corroborates the District Court's perception that the irregularities attending the first sale prejudicially affected the opportunity "to obtain the best price for the bankruptcy estate."* In re General Insecticide, supra.

The second effect of the September sale relates directly to the consequence of granting Appellant the relief it seeks from this Court. To reverse Judge Cannella and reinstate the sale to Dominick's is to deprive the estate of a sum exceeding one-half million dollars. Since the appeal before this Court concerns an attack on an order of confirmation and since, accordingly, the governing concern is to obtain the highest possible price for the bankruptcy estate, In re General Insecticide, supra, the result Appellant seeks should not be permitted. This conclusion is dispositive of the instant

*Further, it confirms the contention that Hancock would have bid vigorously at the first sale had he received an adequate opportunity to prepare for bidding by making appropriate financial arrangements.

appeal. It should be denied.*

Misunderstanding the nature of this appeal, Appellant erroneously argues that the "stricter" standard appropriate to proceedings to set aside a sale is applicable and that, accordingly, the emphasis should be on "finality in judicial sales". As Collier has recognized, however, "[t]he setting aside of a sale is different from ... the reversal on review of or appeal from an order of confirmation." 4A Collier on Bankruptcy ¶70.98 at 1183 (14th ed. 1975). This was the very distinction confirmed by this Court in In re General Insecticide in the passage quoted above. As characterized by that opinion, the case at bar is simply a "direct attack on a confirmation." 403 F.2d at 630-31. Accordingly, the controlling principle is to enhance the value of the estate by obtaining the highest price for the sale of the property. This principle can only be served by denying this appeal and leaving intact the resale to Doyle.

*Indeed, in light of the deprivation the estate would suffer, Judge Cannella's decision should be affirmed whether the appeal before him is construed to have been the direct attack upon a confirmation order which in fact it was, or even if it is determined, in error, that he reviewed a separate proceeding to set aside a sale. Surely the shocking disparity between the proceeds of the first and second sale suffices to meet the standard appropriate to such independent proceedings. See In re Burr Mfg. & Supply Co., 217 F. 16 (2d Cir. 1914).

Although enhancing the bankruptcy estate is paramount, it is not the only concern appropriate to a review of an order of confirmation. It is long-established that "confirmation must depend upon the sufficiency of the notice, the compliance with all necessary or proper requirements in holding the sale [and] honesty and fair dealing in the action itself . . . ." In re Kronrot, 183 F. 653, 655 (E.D.N.Y. 1910). This Court echoed those principles when it said that a confirmation requires that the Court "observed due precaution to see that no wrong has been accomplished in and by the manner in which [the sale] has been conducted." In re Burr Mfg. & Supply Co., 217 F. 16, 18 (2d Cir. 1914). As summarized in Collier's treatise on Bankruptcy:

> "A grant or denial of confirmation or approval is, in a measure, the determination of a legal issue, since it involves an examination of the preliminaries to, and the conduct of, the sale."

4A Collier on Bankruptcy ¶70.98 [17] at 1181 (14th ed. 1975). It is also recognized that "[o]bjections sufficient to defeat confirmation include unfairness toward bidders, stifling of competition, inaccurate or otherwise insufficient advertisement, sham bidding or 'puffing', lack of due notice and interference with the orderly conduct of the sale." 4A Collier on Bankruptcy ¶70.98 [17] at 1187-1190 (14th ed. 1975).

Under these standards the District Court determined that sufficient irregularities, for which counsel for the Trustees are partially responsible, * existed with regard to the May 17 sale so as to warrant a reversal of the order confirming that sale. These irregularities concerned, in part,** the notice procedure used in connection with the sale and the content of the actual Notice given by the Trustees.

The District Court's decision was proper and well within its authority. In Procter & Gamble Mfg. Co. v. Metcalf, 173 F.2d 207 (9th Cir. 1949), the Ninth Circuit addressed an appeal from a District Court's reversal of an order by the referee in bankruptcy which, in part, confirmed a sale by the Trustee.

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* Counsel for the Trustees drafted the Notice for the May 17 hearing as well as the proposed order which Judge Ryan signed on April 30 regarding the "notice period" and the class of persons to receive notice.

**Implicit in Judge Cannella's opinion was concern over the Bankruptcy Court's refusal to consider the $725,000 bid - $40,000 more than Dominick's "successful" bid - communicated to Judge Ryan after the May 17 sale but on the same day and, in any event, before the sale was confirmed. See infra.

> There are no formalistic rules in this matter which are to be enforced at all events. The matter is almost wholly in the discretion of the District Judge. Here a lengthy hearing was held and testimony taken by him. Appellant attributes cabalistic significance to the order of confirmation by the referee. But there are no terms in bankruptcy and the referee might have vacated this order at any time if convinced it was erroneous. But the petition for review was promptly filed. The statute gives the privilege of petitioning for review of any order of the referee. If the contention of appellant were correct, the statute should have excepted orders confirming sales from review. But it was not the intention of the lawmakers that such orders should be chiseled on tablets of stone. The District Judge had the power to review the order. This jurisdiction permitted him to affirm the order or to set it aside, as the facts and legal principles might require . . . Where there are even slight circumstances which suggest that there is unfairness to the estate in bankruptcy, a careful consideration should be had on review and a confirmed sale should be set aside if necessary to rectify the situation. While, if referee and District Judge agree, an appellate court will rarely interfere, the District Judge has the responsibility to see that a sale which leaves the estate unprotected should not be confirmed.

173 F. 2d 209 (emphasis supplied). These principles are echoed in Remington's treatise on bankruptcy:

> "The district Judge has the power to review a referee's order of confirmation and the district judge has almost complete discretion to set aside the sale or to affirm the confirmation."

6 Remington on Bankruptcy, §2551 at 42 (1959) (emphasis supplied).

It is in light of these principles that the District Court's decision must be examined. Such an examination, it is submitted, requires an affirmance by this court, even without considering the effect of the September 10 sale to Doyle. A fortiori, when the effect of that sale - and the consequent loss by the estate of over one-half million dollars should the sale be vacated - is considered in conjunction with the deficiencies addressed in the District Court's opinion, it is clear that the decision below should be summarily affirmed. E.g., In re General Insecticide, supra.*

One of the predicates of the District Court's decision was the determination that the "notice procedure" used in connection with the May 17 sale violated Bankruptcy Rule 10-209(b)(4). That Rule provides:

> "(b) Twenty-Day Notice to All Creditors and Parties in Interest. Except as provided in subdivision (f) of this rule, the trustee or debtor in possession shall give all creditors, stockholders, and indenture trustees, at least 20 days' notice by mail of . . . (4) any proposed sale of property, other than in the ordinary course of business, including the time and place of any public sale, unless the court for cause shown shortens the time or orders a sale without notice. . . ."

*In re General Insecticide Co. is instructive not only because it makes clear that the governing principle in appeals such as the one before this Court is to enhance the bankruptcy estate. The case also confirms that where there is inadequate notice to creditors, which the District Court found to be true in the case at bar, the order confirming the sale should be reversed. 403 F.2d at 630.

The order proposed by counsel for the Trustees and signed by Judge Ryan relating to the notice of the May 17 sale limited the notice period to less than 20 days and limited the class of persons to receive notice. However, neither it nor the application upon which it was based addressed the basis for such limitations. Under these circumstances the District Court correctly concluded that the requirement of "findings" in Rule 10-209(b)(4) had been violated.

This determination by the District Court is both permissible on the face of the Rule and entirely consistent with the general principles underlying the requirement of "findings".* E.g., In re DCA Development Corp., 489 F.2d 43, 48 (1st Cir. 1973). Only when the reasons behind a decision to limit notice are articulated can the parties aggrieved by that decision adequately determine whether there exist grounds upon which the limitation can be challenged. Similarly, a statement of findings is necessary to insure that the reviewing court will be able to examine the propriety of the decision below should there be, as here, an appeal. In re DCA Development Corp. 489 F.2d at 48.

*In its letter to the District Court (523a), counsel for the Trustees explained that "[d]ue to the familiarity of Judge Ryan with all aspects of this [Chapter X] proceeding, not every application brought by the Trustees sets forth all the reasons why notice to all ... parties is deemed unnecessary." (524a). By this statement counsel did not intend to argue to the District Court that Rule 10-209(b)(4) did not require a statement of the reasons for restricting the notice required by that Rule. Nor did counsel attempt to excuse its failure to include in its proposed order such a statement. Counsel was merely providing the Court with an explanation for the notice restrictions it had suggested to the Bankruptcy Court.

Appellant pointedly concedes that "Judge Ryan made no explicit finding for the shortened notice," Appellant's Brief at 38, neither when the limitation was imposed nor thereafter. By itself such a concession should have precluded Appellant from pressing its appeal. It contends, however, that the reason for limiting the notice is "self-evident" from two provisions of the contract between Hancock and the Trustees: (1) Title had to pass by June 1, 1976; (2) the closing could not occur until the entry of an order of the Bankruptcy Court followed by the expiration of the 10-day appeal period. From this Appellant suggests that unless Hancock waived the June 1 closing date, it was impossible on April 29, the date of the Trustees' application to serve notice for a May 17 hearing, to comply with the 20-day notice requirement.

The short response is that Appellant's speculation cannot fulfill the requirement of findings under Rule 10-209(b)(4), nor the principles such findings serve. As the District Court implicitly concluded, persons affected by the restricted notice period should not be required to examine a lengthy technical contract to hopefully discern the basis for such a restriction. In re DCA Development Corp., supra.

The District Court also objected to the absence of findings to explain the limitation on the class of persons to receive notice to only those parties who have filed statements with the Court under Rule 10-211. Judge Cannella stated:

> "While this Court does not suggest that notice to all stockholders and creditors (a group of more than 15,000) is mandated . . . the language of the Rule makes it clear that unless cause is shown such notice is required. It may very well be that notice to all or in fact any stockholders is inappropriate. As to creditors the situation may be different and notice to some or all seems called for when a sale of this magnitude is contemplated. In any event, it is clearly inconsistent with the words and import of Rule 10-209(b)(4) to order a sale of property without notice to creditors and stockholders without a finding by the judge that such notice would be inappropriate in the circumstances."

(15a).

Appellant contends, however, that as to this limitation Judge Ryan complied with Rule 10-209(b)(4) by his reliance on facts in the record which he judicially noticed and later "evidenced" by findings which he related at the June 28 hearing on the application to set aside the first sale.

Appellant's argument is patently unsound. Apart from the fact that the June 28 transcript does not contain a statement by the Bankruptcy Judge of his findings in support of a restriction on the persons to receive notice,* even were findings recited at that time they would not have fulfilled the requirement of Rule 10-209(b)(4). The time to appeal the confirmation order expired ten days after its entry. Had the District Court considered findings "revealed" over three weeks after the expiration of the appeal period it would have set a precedent that ignores the right of aggrieved parties to examine the bases of a Bankruptcy Court's decision to determine whether there exists a ground for appeal. See In re DCA Development Corp., 489 F2d at 48 n. 13. Indeed, such a precedent would have encouraged hasty appeals that might not otherwise be filed.

Similarly, such a precedent would have been incompatible with the District Court's responsibility to review orders of the Bankruptcy Court on appeal. Judge Cannella was asked to review Judge Ryan's confirmation of the May 17 sale. As demonstrated above, the notice procedure

*In response to Judge Ryan's request, Lester Yassky, counsel for the Trustees, detailed reasons in support of the limited notice employed.

used in connection with that sale was appropriate to the District Court's review. Even had Judge Ryan articulated his findings for modifying the notice procedure required by Rule 10-209(b)(4) at the June 28 hearing, had the District Court undertaken its review of the confirmation order prior to June 28, which it could have done, it would have been unable to examine those findings. Accordingly, were this Court to determine that findings allegedly revealed at the June 28 hearing were appropriate to Judge Cannella's review of the order of confirmation, the Court would be setting a precedent for the proposition that a proper review of the orders of the Bankruptcy Court depends upon the District Court's fortuitous delay in commencing that review.*

In sum, the Bankruptcy Court was required to set forth the bases for its decision to depart from the notice requirements of Rule 10-209(b)(4). The order

*Appellant relies heavily upon In re DCA Development Corp., 489 F.2d 43 (1st Cir. 1973) for support of its contention that findings (allegedly) revealed weeks after a confirmation order effect compliance with Rule 10-209(b)(4) and should be considered in a review of that order. The question before the Court in DCA was whether a Referee's "failure to set forth adequate findings in [an] order [approving a transfer of assets] . . . cannot be cured in [the Referee's] later certificate [to the District Court]." 489 F.2d at 48. It was conceded that the Referee had indicated sufficiently detailed findings in the certificate. While acknowledging that "[i]t is, of course, of the utmost importance that the Referee support his orders with adequately stated findings of fact so that the Court can review them," 489 F.2d at 48, and that "[o]rdinarily such findings should accompany the orders," id, the Court agreed with the Sixth Circuit "that when . . . findings of fact in the

restricted the notice period and the class to whom notice would be sent; it did not, however, set forth bases for such restrictions. It was, therefore, technically deficient. The District Court properly concluded that this constituted a violation of Rule 10-209(b)(4), for which the order of confirmation should be vacated. Appellant cannot change these simple facts and its appeal from Judge Cannella's decision should be denied.

In addition to the limitations on the notice procedure, Judge Cannella was concerned with the misleading and inadequate nature of the notice actually given.

A prospective purchaser in a Chapter X proceeding cannot rely upon the Bankruptcy Rules to ascertain the procedure to be followed in the conduct of a sale. This uncertainty results from the "flexibility in the method and form of the sale" permitted the Chapter X Court. Advisory Committee's Note to Rule 10-607. Accordingly, under the Rules of Bankruptcy Procedure,

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Referee's certificate supplement those in his initial order so as to provide the District Court with a complete understanding of his reasons, the requirements of Fed. R. Civ. P. 52(a) have been satisfied." Id. (emphasis supplied).

Appellant's reliance on DCA is completely misplaced. Under the practice addressed in DCA, the District Court's review of a challenged order of the bankruptcy referee awaited the referee's certificate which detailed, inter alia, the issues presented and the "findings . . . thereon . . . ." Bankruptcy Act §39a(8) (11 U.S.C. §67). Accordingly, when the Court in DCA permitted the referee to cure the absence of findings in his order by including them in his certificate it did not set a precedent that would inhibit in any way an expeditious and complete review by the upper court. As demonstrated above, the same "non-prejudicial" precedent would hardly follow were this Court to accept Appellant's argument that findings recited at the June 28 hearing satisfied Rule 10-209(b)(4). Such a precedent would directly prejudice the ability of a reviewing court to examine a Bankruptcy Court's orders in a timely and complete manner.

> "The Court may, on such notice as it may direct and for cause shown, authorize the trustee, receiver or debtor in possession to lease or sell any real or personal property of the debtor, on such terms and conditions as the Court may approve."

Rule of Bankruptcy Procedure 10-607(b).

In the instant case, the only advance information a prospective purchaser of the Chicago Heights property could obtain regarding the procedure to be followed in the conduct of the May 17 sale was supplied by the Notice of Hearing. That Notice informed the reader that the purpose of the May 17 hearing was to consider the Trustee's application "for an order (i) approving an agreement between John E. Hancock ... and the Trustees ... to sell to Hancock the [Chicago Heights] property ... for the price of $650,000 ..." (72a.) The District Court correctly observed that "(t)he notice nowhere indicates that alternative offers will be considered at the hearing, nor does it imply that such is the case." (13a)

The District Court did not dispute the authority of the Bankruptcy Court to entertain alternative offers; however, the Court permissibly concluded that, if that was intended, it should have been indicated by the Notice, both in fairness to the prospective purchaser and in fairness to the ability of the estate to realize the highest price. In re New Strand Theatre, 109 F.Supp. 350 (S.D.N.Y. 1952), aff'd on opinion below, 201 F.2d 889 (2d Cir.), cert denied, 345 U.S. 995 (1953); In re General Insecticide, supra. Under these circumstances, the District Court properly held that the Notice was deficient, and, accordingly, the order confirming the sale to which the Notice related should be vacated.

Although the District Court specifically noted that it would be unfair under these circumstances to expect Hancock to attend the hearing prepared for competitive bidding, it is evident that the Court's concern extended to all prospective purchasers, and significantly, the effect a misleading notice had upon them vis a vis the ability of the sale to realize the highest price for the benefit of the estate. This is made clear by the Court's subsequent statement that "[a] large sum of money is involved in this matter from the perspective of both the Trustees and the prospective purchasers." (emphasis supplied) (13a). The Court's citation to In re New Strand Theatre, supra, also confirms this conclusion. At the page cited in that opinion by Judge Cannella, Judge Weinfeld referred to the necessity of an adequate notice to ensure fairness to prospective purchasers and the best interests of the estate. 109 F.Supp. at 353.

Appellant virtually concedes that the information necessary to an adequate understanding of the nature of the May 17 hearing was not provided by the Trustees in their May 3 Notice. It contends, however, that this defect was cured as "a matter of law" by the principle allegedly set forth in Freehill v. Greenfeld, 204 F.2d 907 (2d Cir. 1953), that "proposed sale[s] by a Chapter X Trustee and the Court's approval thereof are conditioned upon no higher or better offer [being made]. . . ." Appellant's Brief at 21.

Appellant's reliance on Freehill is misplaced. That case concerned an attempt by the contracting party to obtain a release from his contract with the Trustee to purchase property; it is therefore distinguishable from the case at bar. The principle of enhancing the bankruptcy estate would not have been served if the reluctant purchaser in Freehill were freely permitted to rescind his agreement. In any event, the relevant language in the opinion hardly supports the conclusion that recipients of the May 3 notice knew, as "a matter of law," that the May 17 hearing would be a public auction with competitive bidding. Judge Hand merely stated that the contracting party "took his chances on what conditions the Court might impose upon its 'approval' [of the contract]," 204 F.2d at 909 (emphasis supplied), including a public auction of the property.

Nor can Appellant rely on In re Gil-Bern Industries, Inc., 526 F.2d 627 (1st Cir., 1975). In that case the Court indicated that the notice before it was sufficiently ambiguous so as not to preclude a procedure at a confirmation hearing consistent with an asserted "known" local practice of permitting further offers even though the highest bid submitted at closing time was entirely fair and adequate. 526 F.2d at 628. Clearly, this case does not support Appellant's contention that recipients of the May 3 notice would interpret

it to signal a public auction, notwithstanding the Bankruptcy Court's authority under Rule 10-607 to sell privately. Indeed, that notices used in well-publicized bankruptcy cases in this Circuit, such as those cited in Judge Cannella's opinion*, expressly invited alternative offers when competitive bidding was intended certainly encouraged recipients of the May 3 notice to conclude that the notice was not ambiguous, but rather a statement that the sale was not to be a public auction.** Indeed, the notice in Gil-Bern expressly solicited competitive bids.

In addition to the Notice used in connection with the May 17 sale, the District Court's concern for the best interests of the estate was undoubtedly aroused by Judge Ryan's refusal to consider Hancock's bid of $725,000.00 ($40,000.00 more than Dominick's successful bid) telegraphed to the Bankruptcy Judge shortly after the end of the hearing but on the same day and, in any event, prior to confirmation (90a). Contrary to Appellant's argument, consideration of that bid was not foreclosed by Judge Ryan's acceptance of Dominick's bid, notwithstanding the

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* W.T. Grant & Co., 75 B 1735 (Memorandum of May 17, 1976) (Chapter XI) (S.D.N.Y.); R. Hoe & Co., 69 B 461 (Memorandum of November 3, 1975)(Chapter X)(S.D.N.Y.); Continental Vending Machine Corp., 63 B 663 (Memorandum of July 7, 1964) (Chapter X) (E.D.N.Y.).

** It is noteworthy that in Mr. Yassky's letter to the District Court (523a), he indicated that "it can fairly be said that the [N]otice was not prepared [by the Trustees] for the purpose of soliciting bids." (525a).

doctrine of the "finality of sales". It is well-established that "[u]ntil confirmation, even an accepted bid makes the bidder no more than the one whose proposal has been recommended." In re New Strand Theatre, supra, quoting In re Klein's Rapid Shoe Repair Co., 54 F.2d 495, 496 (2d Cir. 1931). Mr. Feller of the Securities and Exchange Commission, quoted so often in Appellant's brief, shared the same view. As he stated to Bankruptcy Judge Ryan, "a judicial sale is not finalized until an order is entered..." (486a).

In his decision, Judge Cannella properly weighed the equities* and concluded that the direct attack upon the order of confirmation, which is the proper characterization of the appeal that was before him, should be upheld in favor of a second sale. The events subsequent to the District Court's decision have confirmed its merit. It should be affirmed.

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*As Mr. Feller stated to Judge Ryan at the June 28 hearing, "Well, this is. of course a court of equity. The buyer, Dominick's Finer Foods, is an individual, and the Court is a court of equity. I think the trustees and the parties have to weigh the equities of the buyer, together with the other interests in the estate." (487a.)

CONCLUSION

For the foregoing reasons, the within appeal should be dismissed as moot, or, in the alternative, the memorandum and order of the District Court dated July 19, 1976 should be affirmed in all respects.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

INTERSTATE STORES, INC., et al,

Debtors-Appellees,

- against -

DOMINICK'S FINER FOODS, INC.,

Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF ss.:

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452.

That on the 18th *day of* November *1976 at* 1. 645 5th Ave. N.Y.C,
2. 90 Park Ave. N.Y.C.
3. 41 East 42nd St. N.Y.C. *upon*

deponent served the annexed brief

1. Goldenbach & Barel 2. Rogers Hogue & Hills 3. Krauss, Hirsch & Gross

the attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 18th
day of November *19*76

Beth A Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Kevin E Thomas

Print name beneath signature
KEVIN E. THOMAS